incapable of proof and without firm basis; it was a despicable attempt by the wife to secure double compensation on what her husband was to receive from the defendant. I had therefore, on 2 February 1994 made an order in terms of enclosure that the claim herein be struck out with costs.

Learned Counsel for the plaintiff applied orally for adjournment of the matter into open Court for further argument under s. 68(2) of Courts of Judicature Act 1964 (O. 56 r. 2(2) has been repealed). I declined as the issues have been exhaustively canvassed before me in chambers.

The Counsel then applied for a stay - of my said order in terms of Enclosure 8 - pending an appeal to the Supreme Court. This was also refused as it is settled that an application for stay on the sole ground that if the structure is demolished, any appeal to the Supreme Court even if successful would be rendered nugatory, is by itself insufficient for this Court to exercise its descretion in the plaintiff's favour. The plaintiff would also have to satisfy this Court that she has arguable grounds of appeal. This was nowhere disclosed in the argument and the affidavits before me.

The last application for leave to the Supreme Court was also turned down as there are no new points of law involved herein - this being merely the case of a plaintiff who has attempted to raise the right to equitable interest by bare allegation - and I am of the opinion that the Supreme Court should also not be clogged with such baseless appeals. I had however indicated that I would write my grounds immediately.

TAN LEE HONG

v.

LETCHMEE D/O VARATHEN (AS REPRESENTATIVE OF THE ESTATE OF VARATHEN S/O GOVINDAN, DECEASED)

HIGH COURT, PENANG
TUAN T. SELVENTHIRANATHAN JC
[CIVIL APPEAL NO. 12-71-93]
12 NOVEMBER 1993

PRACTICE & PROCEDURE: Appeal from subordinate Court to High Court - Failure to lodge security for the costs of the appeal within the time limited - Application for enlargement of time to lodge security - Application filed in the High Court - Whether proper - Order 49 rule 2(5) Subordinate Courts Rules 1980 - Whether High Court has jurisdiction and power to hear the application - Whether s. 25(2) of Courts of Judicature Act 1964 applicable - Whether appellant should be given leave to appeal to Supreme Court.

The appellant appealed to the High Court against the decision of the Sessions Court. On receipt of the Form 141 notice the appellant paid the costs of preparation of the notes of evidence and the grounds of decision. The appellant failed to lodge the security for the costs of the appeal in the Sessions Court within the time limited and the Court treated the appeal as being abandoned.

The appellant applied to the High Court for enlargement of time to pay the security for the costs of the appeal which application was dismissed. The appellant's contention was that the High Court could enlarge the time pursuant to its powers under s. 25(2) of the Courts of Judicature Act 1964 (the Act). The appellant then applied for leave to appeal to the Supreme Court.

Held:

[1] The High Court lacks the power and the jurisdiction to hear the enlargement of time application. Order 49 rule 2(5)(b) of the Subordinate Courts Rules 1980 (SCR 1980) specifically provides for such an application to be made to the Court appealed from. Should the High Court hear the application it would be arrogating to itself a power and jurisdiction which is not conferred upon it by law.

[2] Article 121 of the Federal Constitution as amended by Act A704 stipulates that the High

Court and inferior Courts shall have jurisdiction and powers as may be conferred by or under federal law. The jurisdiction and power to enlarge time in this case is clearly conferred on the inferior Court concerned by O. 49 r. 2(5)(b) of the SCR 1980 and therefore it is that Court which should exercise the power and jurisdiction and not the High Court.

[3] The exercise of the additional powers of the High Court under s. 25(2) of the Act and paragraph 8 of the Schedule to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding is subject to the proviso to that subsection. The SCR 1980 falls within the meaning of "written law" in that proviso and therefore it is the SCR 1980 which has to be looked into when making any application for the enlargement of time within which the security for the costs of the appeal is to be lodged in the Court.

[4] The enlargement of time application should not in the first place have been made to the High Court and since that application was misconceived, the application for leave to appeal to the Supreme Court must necessarily fail.

[Application for leave dismissed with no order as to costs].

Legislation referred to:
Courts of Judicature Act 1964, ss. 25(1), (2), 68(1)
Federal Constitution, Article 121
Subordinate Courts Rules 1980, O. 49 r. 2(5)(a), (b), Form 141

For the appellant - Ismadi Zainal Abidin; M/s. Mahinder Singh Dulku, Ismadi & Co.
For the respondent - Malkit Singh; M/s. Darshan Singh & Co.

JUDGMENT

T. Selventhiranathan JC:
It is not my intention by this decision to set the cat among the pigeons but if that is the end result so be it until the matter is determined otherwise.

This is an application by the appellant (the defendant in the Court below) for leave to appeal ("the appeal application") to the Supreme Court pursuant to s. 68(1) of the Courts of Judicature Act 1964 ("the Act") as the value of the subject-matter herein is below RM100,000.

On 25 October 1993 I heard an application by the appellant for the following orders:

(1) that leave be given to the appellant to pay the deposit of RM250 into Court outside the time limit specified:
(2) that the appellant be given leave to proceed with the appeal herein;
(3) that the costs of this application be borne by the appellant; and
(4) for other appropriate relief.

This application ("the enlargement of time application") was supported by the affidavit of one Ismadi Zainal Abidin, an advocate and solicitor who appeared on behalf of the appellant. He deponed that his firm received the notice in Form 141 of the Subordinate Courts Rules 1980 ("the SCR") on 25 September 1993 informing them that the notes of evidence and grounds of decision in the case were ready and that the cost of preparing the same amounted to RM251.56. The notice which was exhibited to the affidavit stated that in connection with the cost of preparing the said record (i.e. the notes of evidence and grounds of decision), a sum of RM251.56 had to be paid. On 27 September 1993, the firm made payment of the sum to the Court concerned and obtained the notes of evidence and the grounds of decision. The letter forwarding the sum of RM251.56 to the Sessions Court which was exhibited to the affidavit stated very clearly that the **payment** was made **for** the firm to be supplied with the **notes of evidence and grounds of decision** (emphasis added). On 7 October 1993, the firm filed the memorandum of appeal in the High Court. On 15 October 1993, the firm was informed by the Registrar of the Sessions Court that the appellant had not lodged in the Sessions Court the sum of RM250 by way of security for the costs of the appeal within a period of fourteen days from the date of receipt of the Form 141 notice and in the circumstances the Court treated the appeal as being abandoned ("... Mahkamah menganggap rayuan diketepikan").

It was further deponed that when the payment of RM251.56 was made, a clerk of the firm through an unintentional oversight forgot to pay in the security of RM250 which was required to be paid. When the firm became aware of the oversight, they immediately filed the enlargement of time application to lodge the security outside the fourteen-day period.

At the hearing of the enlargement of time application, Encik Ismadi Zainal Abidin appeared for the appellant and Encik Ranjit Singh mentioned the case on behalf of Encik Darshan Singh, Counsel for the respondent. Encik Ranjit Singh informed the Court that Encik Darshan Singh was ill and was unable to attend. However, I proceeded to hear the application and Encik Ismadi made his submission. At the close of submission, I ruled that this was not a proper case for the Court to exercise its discretion and grant the application for enlargement of time to pay in the security for the costs of the appeal, and I therefore dismissed the application.

Today Encik Ismadi and Encik Malkit Singh appear before me on the applicaton by the appellant to seek the leave of this Court to appeal to the Supreme Court. Arguments were advanced as to why such leave should be granted and they are recorded in the notes of proceedings and I do not propose to repeat them here in full. In short, Encik Ismadi contended on behalf of the appellant that all the requirements for appealing to the High Court from the Sessions Court had been complied with except that the security of RM250 had not been lodged within the time prescribed. He stated that there was a dearth of authorities directly on point and therefore this matter needed final determination by the Supreme Court.

Encik Malkit Singh submitted that this was not a proper case for leave to appeal to the Supreme Court to be granted because the decision had been arrived at first instance through witness evidence. There had been a full trial and the decision was made after hearing the witnesses. There was nothing in the affidavit of Encik Ismadi to show that there were merits in the appeal as such, besides his bare averment to that effect.

Order 49 r. 2 (5) of the SCR provides as follows:

> 2. (5) Within 14 days from the receipt of the notification, the appellant shall, unless the court for sufficient cause otherwise orders:
>
> (a) deposit in the court appealed from a sum which in the opinion of the registrar will cover the costs of preparing a sufficient number of copies of the appeal record for the use of the High Court and the parties to the appeal; and
>
> (b) lodge in the court appealed from a sum of two hundred and fifty dollars, or such lesser sum as the court may in any case direct, by way of security for the costs of the appeal.

It is abundantly clear from paragraphs (a) and (b) of subrule (5) that two payments into Court are involved:

(a) one payment is the deposit to cover the costs of preparing a sufficient number of copies of the appeal record; and
(b) the other payment is to provide security for the costs of the appeal.

Should the party appealing against the decision not be able to comply with the requirements of paragraph (a) or (b) of subrule (5) within the stipulated time-frame of fourteen days, it is open to that party to apply to the Court appealed from for an enlargement of time to pay the deposit or lodge the security for the costs of the appeal, as the case may be. The Court appealed from would then have to decide whether there are sufficient grounds to allow the party appealing to lodge the security for the costs of the appeal outside the fourteen-day period stipulated. In such circumstances, that Court would have to consider whether the grounds given for failure to comply with the requirement of paragraph (b) of subrule (5) are sufficient for the Court to enlarge the time within which the security for the costs of the appeal is to be lodged in the Court appealed from. Encik Ismadi argued that the High Court could enlarge the time within which the security could be lodged pursuant to its powers under subsection (2) of s. 25 of the Act. With respect, I do not agree. The exercise of the additional powers of the High Court under that subsection and paragraph 8 of the Schedule to the Act to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding is subject to the proviso to that subsection. Section 25 reads:

> 25. (1) Without prejudice to the generality of Article 121 of the Constitution the High Court shall in the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.
>
> (2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:
>
> Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

The SCR fall within the meaning of "written law" in that proviso. Therefore, it is the SCR which has to be looked into when making any application for the enlargement of time within which the security for the costs of the appeal is to be lodged in the Court. Order 49 r. 2 (5) (b) of the SCR clearly empowers the Court appealed from to enlarge the time beyond the fourteen-day period within which the security is to be lodged. That Court will of course have to have regard to the circumstances obtaining and decide whether the reasons given for failing to lodge the security within time are sufficient to allow the application. In this regard no doubt that Court will bear in mind the authorities on point and exercise its discretion appropriately.

I therefore hold that this Court lacks the power and jurisdiction to hear the enlargement of time application herein. This is because O. 49 r. 2 (5) (b) of the SCR specifically provides for such an application to be made to the Court appealed from. In these circumstances should the High Court hear the application, it would be arrogating to itself a power and jurisdiction which is not conferred upon it by law. I am fortified in taking this approach by Article 121 of the Federal Constitution as amended by Act A704 which came into force in 1983. That Article stipulates *inter alia* that the High Court and inferior Courts shall have such jurisdiction and powers as may be conferred by or under federal law. The jurisdiction and power to enlarge time in this case is clearly conferred on the inferior Court concerned by O. 49 r. 2 (5) (b) of the SCR and therefore it is that Court which should exercise that power and jurisdiction and not the High Court. In the circumstances I hold that the enlargement of time application should not in the first place have been made to the High Court and since that application was misconceived this application for leave to appeal to the Supreme Court must necessarily fail and I therefore make an order dismissing this application. There will be no order as to costs as the respondent chose to be heard on this *ex parte* application.

TEH TEIK SOOI

v.

LIM KOK HEANG & 6 ORS.

HIGH COURT, PENANG
TAN SRI DATUK EDGAR JOSEPH JR. SCJ
[CIVIL SUIT NO. 22-27-87]
10 APRIL 1993

PRACTICE & PROCEDURE: Amendment of pleadings - Application for leave to amend statement of claim made subsequent to an application to strike out statement of claim - Principles governing amendment of pleadings - Power of Court to amend under O. 18 r. 19 Rules of the High Court.

The plaintiff commenced an action against the defendants for a declaration that the plaintiff is a partner in a partnership business known as Hotel Kuala Lumpur, in which the defendants were partners; by virtue of half share through the first defendant and that the second to the seventh defendants having known, acquiesced and/or consented to the plaintiff holding the half share through the first defendant. The plaintiff also prayed for an account of what was due to him from the defendants in respect of money received by the defendants and for an order for payment by the defendants to the plaintiff of any sum found due upon such account. The second to seventh defendants filed an application for an order that the plaintiffs' statement of claim be struck out under O. 18 r. 19 of the Rules of the High Court 1980. But before their application was heard, the plaintiff filed an application for leave to amend their statement of claim by raising the existence of a trust and a novation of the partnership agreement. When the applications were heard in chambers it was ordered that the statement of claim be struck out and leave was refused to amend the statement of claim. The matter was then adjourned to open Court for further argument.

Held

[1] The rule governing the amendment of pleadings is that an amendment should be allowed if it can be made without injustice to the other side and there is no injustice if the other side can be compensated by costs.

[2] As a rule an amendment ought to be allowed if thereby the real substantial question in controversy can be raised between the parties and to avoid multiplicity of legal proceedings.